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No. 68909-6-1

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

Maureen George, individually,

Plaintiff/Appellant,

v.

Property Development
Corporation, a Washington
corporation, and Wallace
Properties, Inc., a
Washington corporation,

Defendant/Respondent.

Brief of Respondent Property
Development Corporation

Kathleen Thompson, WSBA #25737
Attorney for Respondent Property Development Corporation
Law Firm of Gardner Trabolsi & Associates, PLLC
2200 Sixth Avenue, Suite 600
Seattle, Washington 98121
206-256-6309

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COURT OF APPEALS
DIVISION I
SEATTLE, WASHINGTON

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I. ASSIGNMENT OF ERROR

Respondent Property Development Corporation assigns no error to the trial court's Order Granting Defendants' Joint Motion for Summary Judgment.

II. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

Was Property Development Corporation, the alleged property owner, entitled to summary judgment dismissal where Property Development Corporation was not in fact the property owner; there was no evidence Property Development Corporation had notice the chair was potentially dangerous, and there was no evidence the alleged incident occurred as a proximate result of negligence on its part? *Yes*.

Did Plaintiff's Spoliation argument in opposition to Defendants' motion for summary judgment, warrant denial of Property Development Corporation's motion where Property Development Corporation, the alleged property owner, was not in fact the property owner; there was no evidence Property Development Corporation intentionally destroyed the chair, or had possession of it, or had a duty to retain it; and the doctrine of spoliation was not relevant as to whether Property Development Corporation had notice the chair was potentially dangerous? *No*.

III. STATEMENT OF THE CASE

1. Facts

On June 2, 2011 Plaintiff Maureen George filed a lawsuit against Property Development Corporation and Wallace Properties, Inc. in King County Superior Court (No.11-2-18607-5SEA). Plaintiff claimed she was injured at the Le Chateau Apartments on July 13, 2008, where she was a tenant, when a pool area chair broke after she sat in it. She alleged that Wallace Properties, Inc. was the property manager and Property Development Corporation was the property owner. (CP 1-4).

Plaintiff alleged that Wallace Properties, Inc., the property manager, and Property Development Corporation, the alleged property owner, negligently failed to (1) properly maintain, inspect, and/or repair community furniture (the chair); (2) properly train and supervise its employees and agents regarding the proper policies and procedures to follow after a tenant is injured, including the preservation of material evidence; and (3) failure to properly preserve material evidence, particularly the subject chair. Two of Plaintiff's three theories of liability against Defendants for *causing* the incident actually pertained to actions Defendants allegedly did or did not take *after* the incident. (CP 1-4).

On August 8, 2011 Property Development Corporation filed an Answer denying liability. It denied that it owned or operated or had any involvement in supervising or maintaining the property. It further stated that the property was owned by Monte Villa Properties, LLC, not Property Development Corporation. It included as affirmative defenses, "Plaintiff has failed to state a claim upon which relief can be granted," and "Plaintiff has failed to name the proper parties. Property Development Corporation did not own or manage the Le Chateau Apartments where the alleged incident occurred." Thus, Plaintiff was made aware as of August 8, 2011 that she had named the wrong party. (CP 5-8). However Plaintiff did not name Monte Villa Properties, LLC, as a defendant in this lawsuit. (CP 1-4).

Janine Berryman is the general manager and Vice President of Property Development Corporation. Property Development Corporation does not and has never had any ownership interest in the subject property- the Le Chateau Apartments- where the incident occurred. . Monte Villa Properties, LLC currently, and at the time of the incident, owned the property. Monte Villa Properties, LLC is merely an additional insured of Property Development Corporation. (CP 46-47).

At the time of the subject incident Wallace Properties, Inc. was managing the apartment complex pursuant to a Property Management

Agreement with Monte Villa Properties, LLC. The contract was between Wallace Properties, Inc., and Monte Villa Properties, LLC., and not Property Development Corporation. (CP 46-47).

Wallace Properties, Inc. managed the property until February, 2009, at which time a new company, Sherron Associates, Inc., took over as property manager (CP 83-84). At the time of the incident, Ron Coyle, a Wallace Properties, Inc. employee, was the Assistant Resident Property Manager at the complex. He was on the property at the time of the incident. According to a Declaration prepared by Plaintiff's counsel for Mr. Coyle, which is dated April 27, 2012, Mr. Coyle responded to the pool area after being made aware of the incident. He prepared a written statement of his observations and took photos of the chair. Then he reportedly placed the chair in a utility room. (CP 58-60).

Nowhere in his declaration does Mr. Coyle state that he observed or was aware of any defects, damage, cracks or breaks in the subject chair prior to its alleged collapse. Nor does he state that he has any reason to believe his employer, Wallace Properties, Inc. or the property owner were aware of any defects, damage, cracks or breaks in the subject chair prior to its alleged collapse. (CP 58-60).

Neither Monte Villa Properties, LLC or Property Development Corporation had any involvement whatsoever in the design or manufacture

of the chair. Nor did either company purchase the chair. Nor did they have any knowledge or reason to believe that the chair was defective or in need of repair or potentially hazardous prior to the date of the incident. (CP 46-47).

On February 22, 2012, Defendants deposed Plaintiff. During that deposition she testified that she did not have any reason to believe the chair was damaged, dangerous, or broken prior to its alleged collapse. (CP 40). She also testified that she does not have any evidence that Wallace Properties, Inc. or the property owner knew or should have known prior to the incident that the chair might break or was dangerous. (CP 41,43).

Plaintiff testified that she moved into the complex in 2002 and during the six summers prior to the date of the incident she had been to the pool area at least once, and maybe up to three times each summer. On various occasions she sat in the pool-side swivel chairs, and never experienced any problems with them. Nor did any of them appear to be broken. The chair that broke was a metal swivel chair. She recalls there were about eight similar metal swivel chairs around the pool area, as well as matching tables. The tables and chairs were about three years old at the time of the incident and had been brought in to replace the old ones. (CP34-40). Plaintiff further testified as follows:

Q. Okay. Did you personally on the date of your accident have any reason to think that the chair might be dangerous or might be broken when you sat on it?

A. No.

Q. And- and you said you didn't see any breaks. I just want to make sure, did you see any cracks, did you see any damage to any of these types of chairs before your—your accident?

A. No.

...

Q. So my question was, did the chairs look to be in good condition before your accident to you?

A. They had been out there for three years in the weather, but they looked –I wasn't aware that any of them were broken or defective.

...

Q. Did the chairs look clean? They had been, so there is some weathering maybe, but did they look clean to you at the time of your accident?

A. Yes.

(CP 40-41).

Plaintiff also testified:

Q. Do you have any evidence that the owner knew or should have known that the chair was dangerous or might break?

A. No.

(CP 43).

2. Procedure

A. Defendants' Motion for SJ

Following Plaintiff's deposition, Defendants filed a joint motion for summary judgment. This motion was heard by Judge Barnett on May 11, 2012. Wallace Properties, Inc. submitted its brief with a declaration

from Felicia Tsao, President of the Property Management Division of Wallace Properties, Inc. Evidence was presented that Wallace Properties, Inc. managed the property from February 1, 2004 until February 2009; that as part of an upgrade Wallace had purchased patio tables and chairs for the pool area from Home Depot in May of 2004 (a ledger page was attached to the declaration showing this purchase); and that at no time prior to the date of the incident was Wallace or any of its employees “aware of any defects, damage, cracks or breaks in any of the chairs or tables that were purchased approximately four years earlier for use around the pool.” (CP 26-29).

Property Development Corporation submitted a brief and declaration from Janine Berryman, its Vice President, presenting evidence that Monte Villa Properties, LLC was the actual property owner, not Property Development Corporation; that Monte Villa Properties, LLC was a named insured of Property Development Corporation; that Wallace Properties, Inc. was managing the property pursuant to a Property Management Agreement with Monte Villa Properties, LLC; and that “[a]t no time before the alleged incident were Monte Villa Properties, LLC or Property Development Corporation or any of its employees aware of any defects in the subject chair, or need for repair or potential hazard

associated with the chair. They had no reason to believe or knowledge of the same.” (CP 44-47).

Property Development Corporation and Wallace Properties, Inc. argued that a property owner or occupier owes a duty to invitees to exercise ordinary care to maintain the premises in a reasonably safe condition; that the owner or occupier is liable for injuries to an invitee caused by a condition on the property only if he knows or by the exercise of reasonable care should know the condition involves an unreasonable risk of harm; and that Plaintiff had failed to establish that either the property manager or the owner had actual or constructive notice that the chair was in a dangerous condition prior to its collapsing, as there were no such facts to support the same. (CP 16-24), (CP 44,45)

B. Plaintiff’s Brief in Opposition

Plaintiff filed a response essentially arguing that Defendants’ inability to locate the chair when her attorney inquired about it approximately one year after the incident was sufficient basis to deny the motion. Plaintiff did not address the substance of Defendants’ motion- no evidence of notice. Plaintiff’s sole argument was based on spoliation. (CP 48-47).

In support of her spoliation argument, Plaintiff submitted a declaration from Ron Coyle, a Wallace Properties, Inc. employee. He

stated that on July 13, 2008 he put the chair in a utility room on the property; that “around the first part of 2009” he became aware that a new property management company, Sherron & Associates, was going to take over as property manager; that on February 6, 2009 he emailed Connie Shyne at Wallace and told her where he stored the chair; and that on March 12, 2009 he emailed a woman named Crystal Schroeder at Sherron & Associates and told her about the incident and where he stored the chair. He made no mention of any communications with the property owner. (CP 58-60).

Plaintiff’s counsel also submitted a declaration stating that on July 22, 2009, (more than one year after the incident) he mailed a letter to the apartment complex addressed to “To Whom It May Concern” requesting inspection of the chair; that “shortly after” mailing the letter he spoke to an unnamed adjuster from Property Development Corporation’s insurance company and inquired about the chair; that this unnamed person told him it couldn’t be located; and that on September 18, 2009 the insurance carrier for Property Development Corporation sent a letter to Wallace Properties, Inc. stating that it would be looking to them for indemnification. (CP 63-64).

The above mentioned declarations are the sum and substance of purported evidence of spoliation.

C. Wallace Properties, Inc.'s Reply

Wallace Properties, Inc. argued in reply that the evidence established they kept the chair in storage on the property right up until the time the new property management company took over in February of 2009; that they had no control over the chair after that time; that even if there were evidence of spoliation, which was not the case, the spoliation argument did not create a genuine issue of material fact as to whether Defendants had notice the chair was defective or dangerous; that Defendants were not contending the chair was not defective or that it did not break; that the chair did not contain evidence of notice and so the loss of the chair was not material to Defendants' motion; and that the chair's availability would not give Plaintiff the evidence of notice she needs to create a genuine issue of material fact." (CP 77-81).

D. Property Development's Reply

In reply, Property Development Corporation argued the following:

Property Development does not concede that it is a proper party here, as it does not own and has never owned the Le Chateau Apartment complex. *See Declaration of Janine Berryman*. However, for purposes of this motion, Property Development Corporation, as the "alleged" property owner, will address the issue before the Court. Nothing in Plaintiff's brief addresses the primary issue. This motion centers on whether Plaintiff has established or can establish by competent evidence that the property management company and/or the apartment complex

owner had actual or constructive notice that the chair was in a dangerous condition prior to its alleged collapse. The answer is no.”

(CP 93).

Property Development Corporation further argued there was insufficient evidence that either party intentionally destroyed the chair; that more importantly, the spoliation doctrine had no relevance as to whether the property manager or owner knew or should have known the chair was dangerous prior to the incident; that even if the doctrine were applicable, which was not the case, it would not dispense with Plaintiff’s burden of proving Defendants had notice the chair was dangerous and failed to use reasonable care despite such notice. (CP 91-95).

Property Development Corporation further argued:

The fact that the current whereabouts of the chair are unknown is not evidence in and of itself that anyone intentionally destroyed it. Clearly, according to Mr. Coyle’s Declaration, he made an effort to store the chair following the incident. Mr. Coyle appears to be the person with most knowledge regarding what happened to the chair immediately following the incident. Yet Mr. Coyle does not present any evidence or knowledge on his part that anyone intentionally destroyed the chair. The facts suggest at most that over the passage of time and as a result of a change in property management companies, the chair was lost in the shuffle. However, even that is speculation. To jump to a conclusion that either party or the owner intentionally destroyed the chair is simply not supported by any competent evidence.

(CP 95).

E. Court's Decision

On May 11, 2012, Judge Barnett granted Defendants' motion and dismissed Plaintiff's case with prejudice. The court found that neither the property manager or the property owner had notice or reason to believe the chair might be dangerous, and dismissed Plaintiff's cause of action. (CP 103-105).

At the hearing, argument regarding Property Development Corporation was as follows:

Ms. Thompson: ---we join in the same argument as Wallace Properties. But I represent Property Development Corporation, and as I stated in our briefing, Property Development Corporation does not and has never owned this property. Monte Villa does. And Monte Villa is not named in this lawsuit.

In this situation, what I decided to do was just proceed, join in this motion and assume just for purposes of the argument and for trying to resolve this issue that Property—kind of stand in the shoes of Property Development as being the owner. But our argument is, for the most part, the didn't owner didn't have any notice as well, the alleged owner, nor the actual owner. There's simply nothing here. They have presented no evidence that either Property Development or Monte Villa for that matter had any notice of any prior defect or danger, any need of repair or anything along those lines.

And with respect to the spoliation, I'm not going to repeat any of the arguments made by Mr. Dean. We join in those. But with respect to spoliation on Property

Development Corporation's part...that certainly wouldn't apply to Property Development, because they didn't own the property. Nor does it apply to the actual owner, Monte Villa. And there's just simply nothing in the record presented by Plaintiff showing the same.

They mention Sharron & Associates, a property manager who took over after Wallace Properties left the scene. And there's really no evidence that they did nor didn't anything wrong, but we—I don't represent Sharron & Associates, and they're not a party to the lawsuit. There's nothing in the records showing that there was anything on the part of the owners with respect to spoliation.

Verbatim Report of Proceedings p. 9-11.

IV. **LEGAL AUTHORITY AND ARGUMENT**

STANDARD OF REVIEW

“The standard of review on appeal of Summary Judgment is de novo, with the reviewing court performing the same inquiry as the trial court.” *Ski Acres v. Kittitas County*, 118 Wn.2d 852, 854, 827 P.2d 1000 (1992).

Summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

The party moving for summary judgment bears the initial burden of showing the absence of an issue of material fact. *Young*, 12 Wn.2d at 225.

Once that initial burden has been met, the burden shifts to the nonmoving party to set forth “specific facts showing there is a genuine issue for trial.” *Rathvon v. Columbia Pac. Airlines*, 30 Wash. App. 193, 201, 633 P.2d 122 (1981), *review denied*, 96 Wn.2d 1025 (1982). In doing so, the nonmoving party can no longer rely on the allegations in the pleadings. *Ashcroft v. Wallingford*, 17 Wash. App. 853, 854, 565 P.2d 1224 (1977), *review denied*, 91 Wn.2d 10, 16 (1979).

A defendant may move for summary judgment by either: (1) setting forth its version of facts and alleging that there is no genuine issue of material fact, or (2) alleging that the nonmoving party lacks sufficient evidence to support its case. *Guile v. Ballard Comm. Hosp.*, 70 Wash. App. 18, 851 P.2d 689, *review denied*, 122 Wn.2d 1010, 863 P.2d 72 (1993). In the latter case, the moving party need not support its motion with affidavits, but must simply identify those portions of the record that it believes demonstrate an absence of a genuine issue of material fact. *Id.*

The purpose behind a summary judgment motion is “to examine the sufficiency of the evidence behind the plaintiff’s formal allegations in the hope of avoiding unnecessary trials where no genuine issue as to a

material fact exists.” *Young v. Key Pharmaceuticals, Inc.*, at 226, citing *Zobrist v. Culp*, 18 Wash. App. 622, 637, 570 P.2d 147 (1977).

1. **Property Development Corporation’s dismissal was proper as it was not the owner of the property and there were no genuine issues of material fact as to whether it had notice the chair was potentially dangerous and/or that it breached a duty of care to plaintiff.**

Plaintiff’s theory of liability against Property Development is based on its alleged ownership of the property. The duty owed by a property owner to its tenants is as follows:

An owner or occupier owes to a [business] [or] [public] invitee a duty to exercise ordinary care [for his or her safety.] [This includes the exercise of ordinary care] [to maintain in a reasonably safe condition those portions of the premises which the invitee is expressly or impliedly invited to use or might reasonably be expected to use].

WPI 120.06; *Ford v. Red Lion Inns*, 67 Wn. App. 766, 770, 840 P.2d 198 (1992)

Generally speaking, the **possessor of land** is liable for injuries to a business visitor caused by a condition encountered on the premises only if he (a) **knows or should have known of such condition and that it involved an unreasonable risk**; (b) has no reason to believe that the visitor will discover the condition or realize the risk; and (c) fails to make the condition reasonably safe or to warn the visitor so that the latter may avoid the harm.

Leek .v Tacoma Baseball Club, Inc., 38 Wn.2d 362, 365-66, 229 P.2d 329 (1951).

The courts have adopted Restatement (Second) of Torts § 343 (1965), which provides:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land, if but **only if**, he

- (a) **knows or by the exercise of reasonable care would discover the condition**, and should realize that it involves an unreasonable risk of harm to such invitees; and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and
- (c) fails to exercise reasonable care to protect them against the danger.

Ford v. Red Lion Inns, supra, 67 Wn. App. at 770. WPI 120.07.

Basic in the law of negligence is the tenet that the duty to use care is predicated upon knowledge of danger, and the care which must be used in any particular situation is in proportion to the actor's knowledge, actual or imputed, of the danger to another in the act to be performed.

This principle is an integral part of the law relating to the liability of the owners or occupants of premises.

Leek .v Tacoma Baseball Club, Inc., supra, 38 Wn.2d at 365-66.

A plaintiff must establish that the defendant "knows or by the

exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees.” *Ford v. Red Lion Inns, supra*, 67 Wn. App. at 770. The court in *Ford* stated:

Washington Law **requires plaintiffs to show the landowner had actual or constructive notice of the unsafe condition.** ... The notice requirement insures liability attaches only to owners once they have become or should have become aware of a dangerous situation.

Iwai v. State, 129 Wn.2d 84, 96-97, 915 P.2d 1089 (1996).

Clearly, Plaintiff could not establish a negligence claim against Property Development Corporation as the property owner where it was undisputed that Property Development Corporation was not the owner. It wasn't the owner, or occupier, or possessor of the property. At no time did Property Development Corporation ever concede it was. The record shows quite the contrary. Therefore, there was no viable cause of action against Property Development Corporation from the start, and so dismissal was warranted.

Since Property Development Corporation was not the owner, Plaintiff could not prove that Property Development Corporation had notice of the dangerous condition of the chair based on its ownership

relationship to the property. Therefore, Plaintiff's claim must fail.

Plaintiff could not establish the existence of a duty owed to her on the part of Property Development Corporation arising out of its ownership of the party since it was not in fact the owner. That fact will not change. If this case were to proceed to trial, the jury would learn that Property Development Corporation was not the owner, making the claim against it based on its ownership, meritless. Plaintiff would not be able to present evidence to the contrary. Therefore, it is impossible for Plaintiff to present genuine issues of material fact regarding the status of Property Development Corporation as the property owner.

There is no evidence to establish that Property Development Corporation had notice of the dangerous condition of the chair by virtue of its wrongly alleged ownership status, or any duty to protect a tenant that wasn't theirs. Nor is there any evidence of notice on the part of the actual property owner, although dismissal of Property Development Corporation is not dependent on whether or not Plaintiff can establish the actual owner had notice. Plaintiff must prove that Property Development Corporation had notice as the owner, and she cannot do so.

Plaintiff could not and cannot prove that the property owner (much less Property Development Corporation) breached any duty of care to the Plaintiff. There is no evidence whatsoever that the property owner knew or should have known the chair would break. There are no facts to

support that claim. The chair was only four years old. There was no evidence it was in poor condition or had been neglected in such a way that the owner should have known. In fact the Plaintiff stated the contrary. There is no evidence of any communication having been made by anyone to the property owner prior to this incident with respect to the condition of this chair or any of the chairs, for that matter. Plaintiff did not raise any genuine issues of material fact regarding the same.

Plaintiff's counsel attempted to create a genuine issue as to whether Property Development Corporation as the owner had notice of the dangerous condition of the chair sufficient to impose liability. Plaintiff argued that this was created by a conversation he had with an unnamed claims adjuster for Property Development Corporation. Any purported communications he had with a claims adjuster after the incident by no means amounts to a genuine issue of material fact as to whether Property Development Corporation, as the alleged owner, had notice. It wasn't the owner, and it didn't have notice. A conversation with a claims representative, no matter what the substance of the conversation was, does not amount to evidence showing the contrary.

2. **The Doctrine of Spoliation did not warrant denial of Property Development Corporation's motion where it was not the property owner; there was no evidence it ever had the chair, or destroyed it, or had a duty to retain it; and any issue as to the whereabouts of the chair during the year after the incident was not relevant to the issue of prior notice.**

Plaintiff's response in opposition to Defendants' motion for Summary Judgment focused entirely on the doctrine of spoliation and allegations that Defendants intentionally destroyed evidence that was in their possession. That argument did not salvage Plaintiff's meritless claim against Property Development Corporation where it wasn't even the owner and would not have had possession of the chair or any duty to retain it.

Nor was there any evidence that the actual owner participated in spoliation (although, once again, Property Development Corporation's dismissal was not dependent on the presence or absence of such evidence of the actual owner, who was not a party to the lawsuit).

More importantly, Plaintiff's reliance on the Spoliation Doctrine was misplaced as it had no bearing on or relevance as to whether the property manager or property owner knew or should have known the chair was dangerous prior to the incident. The whereabouts of the chair after the incident did not in any way create an issue as to whether the property manager or owner had notice the chair would break.

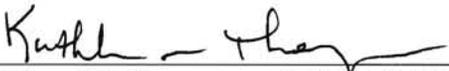
Even if the doctrine of spoliation were applicable in this case, which Defendants deny, the doctrine would not dispense with Plaintiff's burden of proving Defendants had notice the chair was dangerous and failed to use reasonable care despite such notice.

V. CONCLUSION

Based on the above, the Court's decision to dismiss Defendants' claim was proper, and should be affirmed.

DATED this 15th day of October, 2012.

GARDNER TRABOLSI & ASSOCIATES PLLC

By 
Kathleen M. Thompson, WSBA #25767
Of Attorneys for Respondent Property
Development Corporation

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

MAUREEN GEORGE, individually,

Plaintiff/Appellant,

v.

PROPERTY DEVELOPMENT
CORPORATION, a Washington
corporation, and WALLACE
PROPERTIES, INC., a Washington
corporation,

Defendants/Respondents.

No. 68909-6-I

CERTIFICATE OF SERVICE

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I, Cheryl B. Lee, certify and declare as follows:

I am over the age of 18 and am otherwise competent to make this declaration. This declaration is made upon personal knowledge setting forth facts I believe to be true.

That on October 15, 2012, I caused to be served via ABC Legal Messenger and U.S. Mail, first class postage prepaid, a true and correct copy of the attached **Brief of Respondent Property Development Corporation**, on the following counsel of record:

Brett Herron, WSBA #31573
PHILLIPS LAW OFFICE, PLLC
1750 112th Avenue N.E., Suite A208
Bellevue, WA 98004

Mark C. Dean, WSBA #12897
LAW OFFICES OF MARK C. DEAN
2510 Wells Fargo Center
999 Third Avenue
Seattle, WA 98104

DATED: October 15, 2012, at Seattle, Washington.

By 
Cheryl B. Lee
Legal Assistant to Kathleen Thompson